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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 11, 2000

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: MM Docket 95-88
RM-8641, RM-8688, RM-8689

Dear Ms. Salas:

Transmitted herewith, on behalf of Woolstone Corporation, are an original and sixteen copies of its "Motion to Strike" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,



Anne Goodwin Crump
Counsel for Woolstone Corporation

AGC:mah
Enclosures

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ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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OCT 11 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	MM DOCKET NO. 95-88
)	
Amendment of Section 73.202(b),)	RM-8641
Table of Allotments,)	RM-8688
FM Broadcast Stations.)	RM-8689
(Rose Hill, Trenton, Aurora, and)	
Ocracoke, North Carolina))	

Directed to: The Commission

MOTION TO STRIKE

Woolstone Corporation ("Woolstone"), by its attorneys, hereby respectfully submits its Motion to Strike portions of the Reply to Opposition to the Application for Review ("Reply") filed by Conner Media Corporation ("CMC") in the above-captioned proceeding on September 15, 2000. Specifically, Woolstone seeks to have stricken from the record in this proceeding the new information, never previously presented to either the Commission or its staff, included in CMC's Reply. With respect thereto, the following is stated:

1. The Commission's Rules prohibit parties to a proceeding from introducing completely new factual information to be considered in an application for review. Indeed, the Rules plainly state that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. §1.115(c). In its attempt to substitute Channel 221A for Channel 283A, previously allotted to Aurora, North Carolina in this proceeding, CMC has submitted entirely new information concerning a site which it claims

could be a viable transmitter site for Channel 221A at Aurora. The designated authority in this proceeding has had no opportunity whatsoever to consider or pass upon this information. CMC acknowledges this defect and requests a waiver of the Commission's Rules, but it has provided no reasoned basis for such a waiver. A claim of updating the record could be made by anyone seeking to submit new information, and the Commission's rule would be rendered meaningless. Moreover, defects in CMC's submission are compounded by the fact that the new information was submitted on Reply, and not even in its initial Application for Review.¹ Section 1.115(d) of the Commission's Rules provides that replies must be limited to matters raised in an opposition to application for review. While the general matter of the lack of a viable transmitter site for a Channel 221A allotment at Aurora was raised in Woolstone's Opposition, that Opposition was based exclusively on material previously submitted to the staff, and the right to reply cannot be read to encompass the submission at this late date of an entirely new proposal for a new transmitter site with new reference co-ordinates, different from those initially proposed by CMC itself. Submission of a completely new technical proposal goes beyond the bounds of an ordinary reply.

2. Furthermore, CMC's Reply amply illustrates the rationale behind the Commission's prohibition of the introduction of new matters at the application for review stage. The information submitted by CMC raises far more questions than it claims to answer.

¹ It should be noted that one of the letters submitted by CMC as new matter is dated June 20, 2000, two months before CMC filed its Application for Review in this proceeding, but CMC provides no explanation as to why it was not included in the Application for Review. Clearly, if CMC sought merely to update the record, it would have done so at its earliest opportunity and not waited until its Reply.

3. For example, CMC has submitted two unsworn letters on Weyerhaeuser letterhead. At best, those letters indicate a willingness on Weyerhaeuser's part to negotiate with CMC on one particular possible tower site. These letters fall far short, however, of establishing that a third party could reach a mutually satisfactory agreement with Weyerhaeuser for the actual construction and use of an appropriate tower. The letter from Howard Spence notes that "final approval of this transaction is subject to our management approval." Reply at Exhibit A. Additionally, the earlier letter from Maro Imirzian states that "we have not settled on the preferred method to proceed...." Reply at Exhibit B.

4. Further, after the filing of CMC's Reply, Woolstone principal Alan Button visited the new proposed transmitter site. As demonstrated in the attached photographs (*see* Exhibit 1), the site is bounded by water in substantial ditch-canals. The site is also part of an area designated by the North Carolina Wildlife Resources Commission as the Gum Swamp Bear Sanctuary. Given the amount of water at or near the proposed site, even assuming agreement with Weyerhaeuser, there is no guarantee that it would be possible to obtain any necessary federal or state wetlands or other environmental permits.

5. Moreover, contrary to CMC's claim, it has not demonstrated that the new proposed allotment site is in compliance with the Commission's spacing rules. Quite the contrary, the Engineering Statement attached to its Reply shows that the proposed site is short-spaced to sites specified in the licenses or applications of three other facilities. Reply at Exhibit C, p. 4. While CMC's engineer, Timothy Warner, attempts to brush this difficulty aside, his brief notes do not explain away the short-spacings. Mr. Warner first notes that the proposed site is short-spaced to a pending upgrade application for WBJD, Atlantic Beach, North Carolina, File No. BPED-

19990628IB. A review of the Commission's database shows that this minor modification application was accepted for filing effective June 28, 1999, and is therefore cut-off. Thus, CMC is now proposing a new short-spacing to a cut-off application without providing any justification.

6. In addition, the proposed site is short-spaced to WAAE(FM), New Bern, North Carolina. While CMC states that the licensee of WAAE(FM), American Family Radio, has agreed to seek a new frequency which would not conflict with CMC's proposed Aurora allotment, there can be no certainty that a suitable substitute frequency could be found for WAAE(FM). More importantly, such a frequency has not been specified to date, and a review of the Commission's database shows that no application has been filed, much less granted. Even if an application were filed, reviewed by the Commission's staff, and granted, the licensee would have to effect the change in frequency, which could mean replacement of the station's transmitter and/or antenna. Clearly, therefore, CMC's blithe assertion that American Family Radio has agreed to seek a change in frequency cannot be viewed as a "done deal" or anything near the equivalent of an actual change in frequency. It should be noted that the suggested change in channel for WAAE is a proposal which would require actions by both third parties and the Commission's staff outside of this proceeding.

7. Finally, it should be noted that the proposed new transmitter site remains short-spaced to the allotment of Channel 224C1 at Ocracoke, North Carolina. While CMC has made many claims about the status of that allotment based upon its claims about one particular site, it has not demonstrated, or even attempted to demonstrate, that there are no viable sites for use at Ocracoke. Indeed, CMC is the only party which has ever found any defect in the Ocracoke allotment. Moreover, the Commission's staff has already considered the issues raised by CMC and approved the allotment. Upon initial review of the upgrade application which resulted in the allotment (File

No. BMPH-19950728IC), the Commission's staff issued a letter requesting further information concerning the allotment reference site. After the applicant submitted an amendment slightly changing the reference co-ordinates and demonstrating the required 70 dBu coverage of the entire Village of Ocracoke, the Commission granted the application. It is entirely illogical to assume that the staff would raise a specific question with an applicant, receive an amendment providing the requested information, and then ignore that information and the issue which the staff had itself raised. Thus, it is clear that the Commission's staff found the Ocracoke Channel 224C1 allotment to be in compliance with the Commission's Rules. Therefore, CMC cannot brush aside the 25 kilometer short-spacing to the Ocracoke allotment based only upon its own claims in this proceeding with regard to that allotment.

8. Taking the foregoing into consideration, it is undeniable that substantial factual and legal uncertainties surround the new site proposal made by CMC in its Reply. These issues include technical matters, such as the three short-spacings described above, as well as uncertainties about the actual ability to use the site proposed. Clearly, such matters are not well suited to initial review, fact-finding, and disposition by the full Commission at the application for review stage. Thus, the new information submitted in CMC's Reply clearly demonstrates the rationale behind the Commission's rule prohibiting the introduction of factual or legal material upon which the designated authority has had no opportunity to pass.

9. As an alternative to waiving Section 1.115(c) of the Commission's Rules, CMC suggested that the proceeding be remanded to the Mass Media Bureau. Woolstone strongly opposes this suggestion, however, because of the further delay and additional expense such a remand would entail. More importantly, no useful purpose would be accomplished by a remand. As set forth

above, even if a landowner's willingness to negotiate on a tower site were assumed, chances that CMC would demonstrate the availability of a viable transmitter site are dubious at best. Nonetheless, it is apparent that, whether through the submission of new material or otherwise, CMC is intent on prolonging this proceeding until its desired upgrade is obtained. Accordingly, to avoid a remand should the Commission deem it otherwise desirable, Woolstone is prepared to stipulate, for purposes of this proceeding, consistent with CMC's Reply, that Weyerhaeuser is willing to negotiate on a possible tower site at the location identified in CMC's Reply. A remand for "updat[ing] the record" is therefore entirely unnecessary and completely inappropriate. It should be noted, however, that a willingness to negotiate does not by itself produce either an executed agreement or a transmitter site in compliance with all governmental requirements.

10. Woolstone's stipulation does nothing to eliminate the other remaining independent grounds for affirming the staff's decision. That Weyerhaeuser is willing to negotiate with CMC on one particular site is hardly equivalent to a viable transmitter site's being assured for Woolstone or any other entity. Even if the Commission were prepared, however, to deem Weyerhaeuser's willingness to negotiate as equivalent to assurance that a site would be available to Woolstone for Channel 221A at Aurora, and even if the technical defects in that site were brushed aside, the fact remains that CMC's proposal for that allotment is seriously flawed. Upon reconsideration in this proceeding, the Commission's staff correctly found that, in light of the conflict with the Ocracoke allotment, CMC's alternate proposal for Aurora violates the Commission's well-established policy that alternate channels suggested after the counterproposal deadline to resolve a conflict between proposals may not be considered if such an alternate proposal introduces a new community into the proceeding. *Memorandum Opinion and Order ("MO&O")*, DA 00-1312, released June 16, 2000.

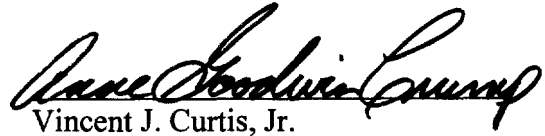
As noted in Woolstone's Opposition to Application for Review, this very proceeding clearly demonstrates the reasoning behind the Commission's policy in this regard. Therefore, even if CMC were to establish upon remand that a viable transmitter site for Channel 221A at Aurora might exist, its Application for Review nonetheless still could not prevail. Thus, a remand in this proceeding would create nothing more than a waste of the time and resources of both the parties to the proceeding and the Commission.

11. Finally, it should be noted that this proceeding has now been pending for well over five years. It is high time that the proceeding should come to an expeditious conclusion. An unnecessary remand would merely drag the proceeding out for additional months or years without reaching any final resolution. It is clear from the previous submissions in this proceeding that CMC has demonstrated no error in the *MO&O*. Rather, CMC is asking the Commission to ignore its own Rules without providing any substantial justification for doing so. The acceptance and consideration of new factual information at this stage of the proceeding could open up the floodgates to myriad other such eleventh-hour proposals by other parties in other proceedings, and the procedural rules governing applications for review would be reduced to a shambles. Accordingly, the Commission should now reject the new information provided by CMC in its Reply and expeditiously resolve the outstanding issues by denying CMC's application for review and affirming the *MO&O*.

WHEREFORE, the premises considered, Woolstone respectfully requests that the Commission strike the newly submitted information contained in CMC's Reply, deny CMC's Application for Review and affirm the *MO&O* in the above-captioned proceeding.

Respectfully submitted,
WOOLSTONE CORPORATION

By:



Vincent J. Curtis, Jr.
Anne Goodwin Crump

Its Attorneys

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EXHIBIT 1

Photographs of Aurora, NC Transmitter Site Identified by Conner Media Corporation

The following photographs were taken at the northeast corner of the site, where Route 33 and an unmarked, unpaved access road (presumably Weyerhaeuser's "Romico Road") intersect.

Photograph 1



From the intersection looking south along the west side of the access road
(the eastern boundary of the site)

Photograph 2



From the intersection looking west along the south side of Route 33
(the northern boundary of the site)

Photograph 3



North Carolina Wildlife Resources Commission sign identifying Gum Swamp Bear Sanctuary,
posted on the south side of Route 33 (northern boundary of the site);
access road and portion of gate shown in Photo 1 also visible

DECLARATION

I, Alan L. Button, hereby declare and state as follows:

I am the President of Woolstone Corporation, the permittee of WFPF(FM), Aurora, North Carolina.

I have read the foregoing "Motion to Strike." I hereby declare under penalty of perjury that the facts set forth therein are true and correct to the best of my information and belief.

Dated this 10th day of October, 2000.

ALAN L. BUTTON

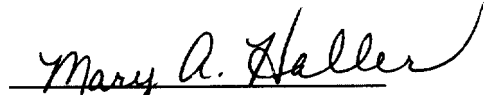
Alan L. Button

CERTIFICATE OF SERVICE*

I, Mary A. Haller, a secretary in the firm of Fletcher, Heald & Hildreth, P.L.C., do hereby acknowledge that true copies of the foregoing "Motion to Strike" were sent this 11th day of October, 2000, by hand delivery, to the following:

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Mary A. Haller

*Service for Bruce Cotton is hereby acknowledged.